MARGARET CHUA v. HO SWEE KIEW & ORS.

[C.A. (Thomson C.J., Hill and Good JJ.A.)
May 27, 1961]

[Penang — F.M. Civil Appeal No. 53 of 1960]

Land Laws — Agreement purporting to be an actual demise — Land subject to charge — Kedah Land Enactment, ss.53 and 92 — Nullity as a lease but good as a contract enforceable between the parties — Damages for breach of contract.

On December 22, 1951, the appellant, the proprietor of two adjoining vacant shop lots in Alor Star town, borrowed from the respondents $30,000 intending to build two shophouses thereon and agreed to grant them a lease for a period of 25 years on completion of the buildings (except the first floor of the premises erected on one lot) upon certain terms and conditions. The appellant also agreed "not to sell or otherwise dispose of the demised premises or any part thereof, without first informing and granting the lenders (respondents) the option to purchase the same at such price and upon such terms and conditions as shall be mutually agreed on." The agreement which purported to be an actual demise to take effect in future was executed in English, not in Jawi, as required by the Kedah Land Enactment. On March 11, 1952, the appellant charged the land to the Oversea-Chinese Banking Corporation for $40,000. The buildings were subsequently completed and on March 1, 1953 the respondents went into occupation. On June 10, 1959, the appellant offered to sell the premises to the respondents for $90,000, which offer was refused as being extremely high but they agreed to purchase the premises at a price to be mutually agreed upon and not at the price quoted by her.

To prevent the lands being sold by the appellant the respondents lodged a caveat, which was discharged by the Court on the ground that the chargee's consent in writing to the lease not having been obtained they had no registrable and, therefore, caveatable interest in the land by reason of section 92 of the Kedah Land Enactment. The appellant then sold the land to a third party and had the charge discharged. The purchaser gave the respondents notice to quit. Further proceedings taken by the respondents for an injunction restraining the appellant from selling the land were of no avail since the land had been sold.

In the event this action was brought by the respondents against the appellant claiming damages. On appeal against the judgment of Barakbah J. declaring the appellant liable in damages for breach of contract,

Held, dismissing the appeal: (1) although the agreement was void as a lease for lack of registration, it was valid as an agreement for a lease enforceable in equity;

(2) the agreement for lease was a binding contract, failure to comply with which was clearly a breach of contract.

Cases referred to:—

(1) *Parker* v. *Taswell*, 2 De G. & J. 559.
(2) *Tidey* v. *Mollett* (1864), 16 C.B. (N.S.) 298, 308.
(3) *Martin* v. *Smith* L.R. 9 Ex. 50, 52.
(4) *Zimbler* v. *Abrahams* [1903] 1 K.B. 577.
(5) *In re Fireproof Doors Ltd.* [1916] 2 Ch. 142, 151.
(6) *Alagappa Chetty* v. *Ng Guan Yin*, 5 F.M.S.L.R. 236.
(7) *Josephson* v. *Mason* (1912), 12 S.R. (N.S.W.) 249 (F.C.).
(8) *Bachan Singh* v. *Mahinder Kaur* [1956] M.L.J. 97.

COURT OF APPEAL.

Eusoffe Abdoolcader and *Chang Min Tat* for appellant.

R. D. Hume for respondents.

Thomson C.J.: The appellant in this appeal was at all material times the registered proprietor of two pieces of land in Alor Star comprised in Surat Putus Nos. 61829 and 61830 (known as Lot 7 and 8 on the Government Survey plan) and the respondents, who are partners, were until recently carrying on the business of a coffee shop on the appellant's land. The appellant is a married woman and at all material times so far as concerns the present case her affairs would appear to have been in the hands of her husband, although she speaks and understands the English language while he says he does not.

Some time in 1951 the appellant was apparently minded to build two shophouses on her land and on 22nd December, 1951, she entered into an agreement with the respondents which was in writing and which must be described in some detail.

This agreement recited that the appellant, who was called "the borrower", was the registered owner of the land and intended to erect two shophouses upon it in accordance with a building plan which had been approved by the Town Board. It went on :—

> "AND WHEREAS the Lenders, at the request of the Borrower, have agreed to lend to the Borrower the sum of Dollars Thirty thousand only ($30,000) in order to enable her to erect the said two Brick Shophouses, upon the Borrower agreeing to repay the said amount on the dates and in manner hereinafter mentioned and also to grant to them a lease of the shophouse standing on Lot No. 8 and the first Floor of the Shophouse standing on Lot No. 7 upon their completion..... for the period and upon the terms and conditions hereinafter provided."

It then provided that in consideration of $30,000, of which $12,000 had been paid on the execution of the agreement and the balance was to be paid, as to $9,000 on the date of completion of the first floors and as to $9,000 on the completion of the roofing of the shophouses, the borrower (i.e. the appellant) undertook to repay to the lenders who were the present respondents that sum of $30,000 by three hundred monthly instalments of $100 each without interest until the whole amount should have been paid, such monthly instalments to be deducted from the rental to be paid in respect of the premises. It went on :—

> "AND in consideration aforesaid the Borrower hereby further agrees and binds herself, to grant and demise and by these presents, doth hereby grant and demise (the premises).....for the term of twenty-five years.....PAYING THEREFOR for and during the said term, the rental of $280 per calendar month."

Then there followed stipulations on the part of the lenders regarding the payment of rent, assessment, rates, taxes and electricity and water supplies and regarding repairs and access and on the part of the borrower to grant the lease and "not to sell or otherwise dispose of the demised premises or any part thereof, without first informing and granting the lenders the

option to purchase the same at such price and upon such terms and conditions as shall be mutually agreed on".

Some time later, on 11th March, 1952, the appellant borrowed a sum of $40,000 from the Oversea-Chinese Banking Corporation by way of security for which she gave a charge upon the land. In the meantime, however, all payments by the present respondents under the agreement of 22nd December, 1951, had been made, the buildings had been completed and on 1st March, 1953, the respondents went into occupation of the whole of the premises except the ground floor of the shophouse erected on Lot No: 7.

The respondents remained in occupation of the premises for a number of years, regularly paying monthly sums of $180 to the appellant which they, at any rate, say they regarded as paying rent at the rate of $280 per month and deducting from that sum instalments of $100 a month by way of repayment of the loan. No steps, however, were taken by the appellant to execute a registrable lease in accordance with the provisions of the Kedah Land Enactment or to obtain the necessary consent of the Bank as chargees to the granting of any such lease, although the respondents claimed that they made frequent verbal requests for this to be done.

In 1957 the appellant demanded an increased rent but this was refused and matters went on as before until 10th June, 1959, that is just over six years after the respondents had gone into occupation of the premises, during which time on their evidence, which was uncontradicted, they had spent $8,000 on alterations to the premises and $28,000 on furnishings.

On that date, 10th June, 1959, the appellant's solicitor wrote a letter to the respondents informing them that his client wished to sell the premises occupied by them and had been offered a price of $90,000. In pursuance of the terms of the agreement he offered the respondents the option of purchasing the premises at this price of $90,000 and said that if they did not exercise "this right of purchase" within three days his client would dispose of the premises as she thought fit.

Not unnaturally this somewhat peremptory letter led to a heated correspondence and in the event the respondents' solicitor on their behalf refused to purchase at the price quoted and threatened legal proceedings.

In the event the present proceedings were commenced on 26th November, 1959. In these the respondents claimed specific performance of the agreement dated 22nd December, 1951, which they said was for a lease for a term of twenty-five years of the land comprised in Surat Putus Nos: 61829 and 61830, or alternatively for damages for breach of contract. They also claimed repayment of $21,900 being the outstanding balance of the loan of $30,000 to the appellant.

On 22nd December, 1959, the appellant paid off her loan of $40,000 from the Oversea-Chinese Banking Corporation and on the following day the Bank granted a discharge of the charge dated 11th March, 1952. The same day, that is 23rd December, 1959, the appellant executed a registrable transfer in respect of the land comprised in Surat Putus No: 61830 in favour of one Teoh Kim Im for a consideration of $45,000 and the following day, 24th December, 1959, the purchaser gave the respondents notice to quit.

The respondents had already taken proceedings to obtain an injunction preventing the sale of either of the two pieces of land. That was obtained too late to prevent the sale of the land comprised in Surat Putus No: 61830. It was, however, presented and registered against the title of the land comprised in Surat Putus No: 61829 and $21,900 out of the proceeds of sale of the land comprised in Surat Putus No: 61830 has been paid into Court in the proceedings entitled Originating Summons No: 311 of 1959.

The case came on for hearing before Barakbah J. He took the view that the agreement of 22nd December, 1951, was a binding contract dealing with a loan of $30,000 by the respondents to the appellant without interest and obliging the appellant to grant the respondents a lease of the land in question for twenty-five years. He considered that the respondents would have been entitled to an order of specific performance but that such an order could not be made by reason of the registered interest which Teoh Kim Im had acquired in part of the land. He accordingly gave judgment in favour of the respondents for $21,900 being the unpaid balance of the debt and for damages for breach of contract to be assessed at a later date.

It is against that judgment that the appellant has now appealed and the assessment of damages has very properly been held over until after the decision of this Court is known.

For myself I am in such entire agreement with the very careful judgment of Barakbah J. that I was at first disposed to do no more than express that agreement. On reflection, however, I think that to do so would be to fail in consideration of the very careful argument which has been addressed to us by Mr. Abdoolcader for the appellant.

In effect the defence to the claim was twofold. On each part of it Barakbah J. came to a conclusion unfavourable to the appellant and the appellant's grounds of appeal can most conveniently be dealt with in relation to the two parts of the defence.

In the first place it was alleged by the appellant that the sum of $30,000, which was admittedly paid to her by the respondents in pursuance of the agreement of 22nd December, 1951, was not a loan but a premium which the partners had agreed to disguise as a loan because

they thought a premium would constitute a contravention of the local legislation relating to rent control.

This was a peculiar attitude to adopt because the premises in question were not subject to rent control. The statute in force at the material date was the Control of Rent Ordinance, 1948, as amended by the Control of Rent (Amendment) Ordinance, 1949, and in terms it excluded from its scope new buildings completed after 31st January, 1948. It is true that the agreement contained an undertaking by the respondents "to pay any lawful increase and increases in the monthly rental if and when such increase or increases are allowed by the law hereafter to be in force" and by the borrower "not to increase or decrease the rental unless and until permitted by the law of the State so to do" but when it is remembered that it was in contemplation of the parties that the agreement should subsist for twenty-five years then these provisions are just as capable of being regarded as anticipatory of possible future legislation as having regard to existing legislation and it is difficult to believe that parties engaged in an urban property transaction in 1951 should not be well aware that premises built after 1948 were free from rent control.

Apart from this, however, there was a great deal of parol evidence and there was also the evidence of the rent receipts given by the appellant which in the majority of instances were for $180 and not $280 the expressed rent under the agreement. In the event Barakbah J. accepted the evidence of the respondents on the point and for myself I can see no reason to quarrel either with his conclusion or with the course of reasoning that led him to it.

The second part of the defence was that the agreement of 22nd December, 1951, was and was intended to be a lease and was null and void by reason of certain provisions of the Kedah Land Enactment.

The land here was comprised in Surat Putus and by section 53 of the Enactment all such land is subject to the provisions of the Enactment and cannot be leased or otherwise dealt with except in accordance with those provisions. Section 92 provides that any lease for a term exceeding one year must be in the statutory form and must be presented for registration together with the issue document of title. The statutory form is in the Malay language written in the Jawi script and bears no resemblance to the agreement of 22nd December, 1951. The section also provides that no lease of land which has been charged shall, if presented, be registered until the chargee has signified in writing his consent to such a lease.

On this it is clear, and the trial Judge so held, that the agreement of 22nd December, 1951, was clearly incapable of registration as a lease. It was, therefore, incapable of conferring upon the purported lessees any real interest in the land and so as a lease it was a nullity.

The Judge, however, was of the opinion, and again I agree with him, that although the agreement might be a nullity as a lease it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease.

For that view there is considerable authority.

In the case of *Parker* v. *Taswell*[1] an instrument which as containing words of present demise was a lease but which not being under seal was void as such by reason of section 3 of the Real Property Act, 1845, (8 & 9 Vict. c. 106) was treated as an agreement for a lease and specific performance was granted. Lord Chelmsford said (at p. 570) :—

> "If the Legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be 'void to all intents and purposes.' There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect."

In the case of *Tidey* v. *Mollett*[2] Erle C.J. referring to leases not under seal, said :—

> "Although at one period the Courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vict. c. 106, for the same reason, the Judges will, if they contain words of agreement, construe them to be agreements only, and not demises, — *ut res magis valeat quam pereat.*"

Again, in the case of *Martin* v. *Smith*[3] the Court was concerned with an instrument not under seal and Kelly C.B. said :—

> "*Parker* v. *Taswell* has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by a decree for specific performance."

Later, in the case of *Zimbler v. Abrahams*[4], Stirling L.J. said (at p. 582) :—

> "Having regard, however, to the decision of Lord Chelmsford in *Parker* v. *Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance."

Finally, in the case of *In re Fireproof Doors, Ltd., Umney* v. *The Company*[5] Astbury J. applied the same principle to debentures that were invalid as such as not being under seal. He said :—

> "A lease void at law under the Real Property Act, 1845, s.3, may be used as an agreement: *Parker* v. *Taswell;* and I see no reason why an irregular debenture should not be treated in the same way."

Apart from English authority it has been made clear more than once in jurisdictions where the law provides for registration of title to land that the law relating to transfer of land is distinct from the general law of contract.

In the Johore case of *Alagappa Chetty* v. *Ng Guan Yin*[6] Brown J. said with reference to an agreement for the sale of land which could not be registered (at p. 241) :—

" The correct view of the effect of such a transaction in the Federated Malay States (and therefore in Johore) appears to be that, not being recognized by the law relating to registration of title, it can operate as a contract and may therefore give rise in appropriate circumstances to a decree for specific performance against the proprietor of the land but cannot create anything in the nature of an incumbrance on the land itself."

In the New South Wales case of *Josephson* v. *Mason*[7], where the facts were not dissimilar to those of the present case except that the plaintiff in that case was the landlord and he was suing for ejectment, it was said by Cullen C.J. :—

" It was not disputed, and at this day it clearly could not be, that a contract for the granting of a lease would be binding upon the registered proprietor who made it, and that the Act would not stand in the way of a full recognition of such a contract, and the usual equitable incidents attached to it."

Again in the Perak case of *Bachan Singh* v. *Mahinder Kaur*[8] I myself made the following observations from which, on reflection, I see no reason to depart :—

" To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code."

That was a case where it was said that a registrable transfer in the statutory form must be treated as *prima facie* evidence of an antecedent oral contract to sell the land. In the present case, there is no question of a registrable instrument in the statutory form and of course there is no question of an oral contract. There is, however, a written contract and in my view it is a binding contract. It is a contract with which the appellant has failed to comply and of which she is clearly in breach. In the circumstances, in my view, the respondents are entitled to their remedy.

I would dismiss the appeal with costs and make the necessary order for payment out of the deposit to the respondents against their taxed costs.

With regard to the money in Court in Originating Summons No: 311 of 1959, it is not open to this Court to make any order in the present proceedings. It would, however, seem to follow from what I propose that judgment will ultimately be entered for the present respondents for an amount which must be something more than the amount in Court and that being so, given good sense on the part of the parties, the disposal of the money in Court should present no difficulty.

Hill J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Good J.A.: I have had the advantage of reading the judgment of the learned Chief Justice. I am in complete agreement with it and have nothing of my own to add. I too would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chang Min Tat; Hogan, Adams & Allan.*

TAN BUCK TEE v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) March 8, 1961]

[K.L. — F.M. Criminal Appeal No. 1 of 1961]

Criminal Law and Procedure — Murder trial — Summing-up — Misdirection — Whether substantial miscarriage of justice — Penal Code, ss.299 and 300.

Appeal — Power of Court of Appeal under proviso to s.29(1) of the Courts Ordinance, 1948.

Evidence — Onus on defence — Need not satisfy jury on "balance of probabilities."

Where there was a body with five appalling wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe, then in the absence of anything else whoever inflicted those blows must have intended to kill the person on whom they were inflicted. In the absence of any evidence as to insanity, provocation or self-defence, the only question for the jury to consider was whether they were satisfied beyond reasonable doubt that it was the accused who inflicted the injuries. In such circumstances it would be quite adequate for the Judge merely to tell the jury that murder is the deliberate killing by one human being of another, that is killing with the intention to kill.

Per Curiam: That there was no miscarriage of justice within the meanings of the proviso to section 29(1) of the Courts Ordinance, 1948 in this case.

Observations on the onus of proof.

Obiter: In certain cases of homicide the evidence may be such that it becomes necessary to consider with very great care whether or not the intention with which the act was done does or does not come within the definitions of criminal intention set out in sections 299 and 300 of the Penal Code. In such cases it is necessary for the Judge to spell out with the greatest possible care such portions of sections 299 and 300 as may be appropriate so that the jury may be in no doubt as to the question to which they have to give answer.

Cases referred to:—

(1) *William Hampton's Case* 2 Cr. App. R. 274, 276.

(2) *Rex* v. *Meade* [1909] 1 K.B. 892, 898.

(3) *Oster-Ritter's Case* 32 Cr. App. R. 191, 194.

(4) *Woolmington* v. *The Director of Public Prosecutions* [1935] A.C. 462, 482.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.